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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ZURVAN MAHAMEDI, Plaintiff and Appellant, v. LITTELFUSE, INC., et al., Defendants and Respondents.	H043477 (Santa Clara County Super. Ct. No. 1-15-CV278496)

This action arises out of a defunct corporation's nonpayment of legal fees and costs to its longtime patent counsel. After Shocking Technologies, Inc. (Shocking) filed for bankruptcy protection, the attorney, appellant Zurvan Mahamedi brought suit against two directors, one officer, and the major corporate investor of Shocking to collect the unpaid fees and costs. The named defendants were Shocking's president, chief executive officer, and director, Lex Kosowsky, general counsel Marius Domokos, outside director and respondent David Heinzmann, and leading investor and respondent LittelFuse, Inc. (LittelFuse). In December 2015, the court below sustained without leave to amend the demurrer of LittelFuse and Hinzmann (hereafter, collectively, respondents) to Mahamedi's second amended complaint (Complaint), and he appeals from the dismissal entered on that order.

Mahamedi's contends that the trial court erred because he alleged facts sufficient to constitute causes of action for breach of fiduciary duty, negligence, and fraud and deceit (concealment). He argues further that the court erred in finding insufficient the allegations in the Complaint that respondents were liable under civil conspiracy and aider and abettor theories. We conclude that the court did not err in sustaining the demurrer to the Complaint. We will therefore affirm the order of dismissal entered in favor of respondents Heinzmann and LittelFuse.

I. PROCEDURAL BACKGROUND

A. Mahamedi's Pleadings

1. Prior Pleadings

Mahamedi filed his original complaint on March 23, 2015, naming as defendants Kosowsky, Domokos, and LittelFuse. The court sustained the demurrer by LittelFuse to the original complaint with leave to amend. Mahamedi filed a first amended complaint against the same parties and, additionally, named Heinzmann as a defendant. The court sustained respondents' demurrer to the first amended complaint with leave to amend.

2. Second Amended Complaint

Mahamedi filed a (Second Amended) Complaint on September 15, 2015. He alleged seven causes of action: (1) breach of fiduciary duty (against Kosowsky, Domokos, and Heinzmann); (2) unfair competition (against Kosowsky, Domokos, and Heinzmann); (3) negligence (against Kosowsky, Domokos, and Heinzmann); (4) concealment (against Kosowsky, Domokos, and Heinzmann); (5) concealment (against Heinzmann and LittelFuse); (6) deceit (against Kosowsky and Domokos); and (7) negligent misrepresentation (against Kosowsky and Domokos). This appeal concerns only the first, third, and fifth causes of action.

Mahamedi described this action, in general, as one seeking "to recover costs and fees incurred for legal services rendered on behalf of his former client[,] Shocking." In his

Complaint, Mahamedi alleged numerous facts common to all causes of action. These allegations include, inter alia, the following facts:[1]

a. Parties

Mahmedi is a member of the law firm presently known as Mahmedi Paradice LLP (law firm). The law firm and Shocking signed a written engagement agreement in 2005. Under the agreement the law firm agreed to provide legal services that included the preparation and prosecution of patents and patent applications in the United States and internationally. Shocking agreed to reimburse the law firm for costs it incurred in representing Shocking for domestic and international patent filing fees. In the area of patent law, it is common for clients to request international protection, and thus their domestic patent attorneys often retain foreign patent law firms to perform international patent filings. Because foreign patent firms delay billing for their services until the engagement is completed, "[t]he expenditures of foreign patent firms is one [*sic*] of the more difficult expenses for patent law firms to manage." Mahamedi is the assignee of all of the law firm's claims alleged in the Complaint.

Kosowsky was the president, chief executive officer, and a member of the board of directors of Shocking. Kosowsky and Mahamedi had a past professional and personal relationship, the two of them having met while the latter was an associate at the law firm of Wilson, Sonsini, Goodrich & Rosati, LLP (WSGR).

Domokos was an officer and general counsel of Shocking. He became its general counsel in 2011, at which time he assumed the role as the person responsible for approval of all invoices by the law firm to Shocking. Domokos also had a prior relationship with

[1] The facts alleged in the Complaint for purposes of demurrer are admitted to be true. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee on Children's Television*), superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227, 228.) In this section, to avoid repetition, we will recite the essential allegations of fact contained in the Complaint without the prefatory, "Mahamedi alleges."

Mahamedi; the two of them had worked as associates at WSGR between 1998 to 2000, and Mahamedi had mentored Domokos for a brief time period in WGSR's patent group.

Littelfuse is a publicly traded company and was a major investor in Shocking, having invested $10 million into Shocking in April 2012. LittelFuse was represented on Shocking's board of directors. Heinzmann was an officer of Littelfuse, and between July 2012 and March 2013, he was a member of Shocking's board of directors.

b. Misrepresentations By Kosowsky and Domokos

The law firm, through Mahamedi, provided legal services to Shocking from 2005 to February 2013, with Kosowsky and/or Domokos (from 2011 forward) authorizing the work. Kosowsky and Domokos closely managed Shocking's intellectual property portfolio because it was the company's principal asset. Accordingly, they worked closely with Mahamedi concerning Shocking patent matters. Mahamedi emphasized to Kosowsky that Shocking needed to remain current on the law firm's outstanding invoices, due in part to large amounts of funds that the law firm advanced for Shocking's international filings.

By early 2012, Shocking's account with the law firm had become seriously delinquent. As of March 2012, the law firm was owed a large amount that was past due, including its having incurred significant out-of-pocket expenses on Shocking's behalf. Mahamedi made periodic inquiries of Kosowsky and Domokos beginning in March 2012 (including written communications to them on March 13 and April 14, 2012) concerning the law firm's accounts receivable and to remind them that the law firm had made significant out-of-pocket payments on Shocking's behalf. Because Shocking was still in arrears, on April 23, 2012, Mahamedi again wrote by email requesting immediate full payment, stating, " 'I can't advance costs going forward if [Shocking] is more than 30 days past due.' " Domokos responded, " 'Understood.' "

In April 2012, Mahamedi met with Kosowsky and Domokos at Shocking's offices concerning the account delinquencies. Mahamedi advised them that (a) the law firm was small and could not carry costs; (b) his law partners were angry at him for having put the

law firm in a difficult position; (c) foreign patent filings were expensive and the law firm as a result accrued "accounts payable 30-120 days in the future"; (d) he was concerned about the financial stability of Shocking; and (e) if he did not receive their "assurance that Shocking was financially stable on rolling 120 day periods, and would pay all the fees incurred by [the law firm]," he would terminate Shocking's engagement immediately. Kosowsky and Domokos responded that Shocking had received approximately $11 million in venture funding that month, the company would need no further funding, and the funding would be sufficient for Shocking to attain profitability. These statements by Kosowsky and Domokos—which Mahamedi designated in the Complaint collectively as " 'Misrepresentation #1' "—were knowingly false when they were made. They were false because (1) there was a technical flaw with Shocking's product, known by Kosowsky as far back as 2010 to exist, that greatly impacted the product's marketability;[2] (2) Kosowsky had made knowing misrepresentations about Shocking's revenues and its customers; (3) Shocking had been engaged in very expensive litigation in Delaware with a dissident director, Simon Michael, that had depleted Shocking's cash; (4) no other investors were interested in Shocking and the company "was going to run out of money in 2012"; (5) Shocking was insolvent at the time in that it was unable to pay its obligations as they became due, as evidenced, inter alia, by the company's having "stopped paying its bills at least as of April 2012";[3] and (6) the law firm "would not be paid for [its] services and

[2] This problem was referred to in the Complaint as "the 'Imped[a]nce Flaw' " or "the Imped[a]nce Issue."

[3] Mahamedi alleges elsewhere in the Complaint that, as disclosed by later bankruptcy filings, Shocking had a large number of unpaid vendors, and it had incurred millions of dollars in legal fee obligations to firms other than Mahamedi's law firm, including (a) $200,551 (dating back to April 2012) to Carr and Ferrel, another patent firm; (b) $1,656,038 to Latham & Watkins, almost all of which having been incurred before April 2012; and (c) $542,263 to its corporate counsel, WSGR, all having been incurred before April 2012.

advances in the imminent future." (These six matters making the representations false are designated collectively in the Complaint as "the 'Failure Conditions.' ")

Mahamedi relied on the above misrepresentations by continuing to provide legal services to Shocking from April 2012 to February 2013. Although the company's account continued to be 60 to 90 days' delinquent, the misrepresentations provided comfort to Mahamedi that Shocking was sufficiently capitalized that payment of the account was not problematic. Further, Mahamedi's reliance was reasonable in part because of his lengthy relationship with Kosowsky and Domokos, and Shocking's having brought the law firm's account current up to August 2012.

In a telephone conversation on July 26, 2012, Domokos assured Mahamedi about Shocking's financial position, confirming that it had sufficient funding to pay for Mahamedi's ongoing services and advanced costs. Domokos told Mahamedi "(a) 'you will know what I know' with regards to the financial health of Shocking ('Misrepresentation #2') and (b) Shocking had $6 million in assets and $0 in liabilities ('Misrepresentation #3')." Domokos's statements were false in that he had no intention of keeping his promise concerning "Misrepresentation #2," he knew Shocking was at the time insolvent, and he knew the matters comprising the "Failure Conditions" (described above) and that Mahamedi was unaware of them. At the time of the misrepresentations—as disclosed by company financial statements—Shocking had approximately $3.8 million in cash and $5.3 million in liabilities. In addition, a Shocking financial report disclosed that as of July 2012, the company's accounts payable were more than $3.5 million. In reasonable reliance upon Domokos's "Misrepresentation #2" and "Misrepresentation #3," Mahamedi performed legal services and advanced costs totaling at least $250,000.

c. August to December 2012 Activity

In response to Domokos's request, Mahamedi prepared a financial report concerning Shocking's patent portfolio that was presented to its board of directors. Domokos and Heinzmann participated at this meeting in August 2012, and the latter was appointed at the

time to the board's finance committee. Heinzmann was aware at the time that Mahamedi had invoiced a substantial amount for his work and advanced costs and the invoices were not being paid by Shocking. Heinzmann and Kosowsky nonetheless "instructed Domokos to spare no expense and to continue [to] aggressively prosecute the patent portfolio." In a later board meeting in October 2012, the members of the Shocking board, including Heinzmann, again instructed Domokos to aggressively secure the company's patent rights, even though the board members knew that Shocking "was going to run out of money and therefore would be unable to pay Mr. Mahamedi for this work." After the board meeting, Domokos instructed Mahamedi to proceed with the necessary patent filings and to make filings in multiple cases that had no real value to Shocking.

In November 2012, Mahamedi met with Kosowsky and Domokos to discuss outstanding invoices and Domokos's request that Mahamedi assume responsibility for additional patent matters previously handled by another law firm, Carr and Ferrell. Mahamedi requested payment on outstanding invoices. He had previously advised Domokos by email on November 6, 2012, that, as of that date, Mahamedi had incurred fees and advanced costs for foreign patent work of approximately $150,000. Kosowsky and Domokos told Mahamedi that Shocking had prevailed in a lawsuit involving a dissident director, thereby "clear[ing] the way for the success of Shocking, which included . . . a major cell phone manufacturer [having] selected Shocking's products for its new, upscale cell phones, and that business partners were 'lining up.' " Kosowsky also said that Shocking would pay Mahamedi approximately $100,000 shortly, and that it would pay the remaining balance by year-end. The statements were made to induce Mahamedi to perform additional work, and "Heinzmann and LittelFuse exercised control over all expenditures at [that] time, including the offer to pay $100,000 to Mr. Mahamedi." Mahamedi continued to rely on these promises, and he, in fact, received a partial payment from Shocking in November 2012.

d. LittelFuse's Line of Credit to Shocking

In November 2012, LittelFuse agreed to provide Shocking a line of credit of $2 million in exchange for taking a security interest in Shocking's patent portfolio. Mahamedi, as Shocking's patent counsel, became involved in this transaction and he performed work for Shocking to respond to the due diligence requests of LittelFuse's counsel and to perfect title to some patents. LittelFuse, which exercised control over Shocking, "agreed with the other Defendants to defraud Mr. Mahamedi by engaging his services knowing that he would not be paid."

This infusion of additional capital into Shocking was the perfection of what was characterized in the Complaint as " 'Plan B,' "[4] which was a September 2012 agreed-upon plan of Kosowsky and Domokos of "an intentional tanking of the company so that LittelFuse could acquire [Shocking's] patent portfolio cheaply . . .[, thereby] ingratiat[ing] Kosowsky and Domokos to LittelFuse so as to allow them to gain employment with LittelFuse and continue working on the technology." Domokos had valued Shocking's patent portfolio in September 2012 at $72 million. The large disparity between the amount of the line of credit from LittelFuse and the value of the security underscored that the purpose of the financing, as agreed by Kosowsky and Domokos, "was to allow LittelFuse [to] acquire Shocking's patent[s] for 'cheap.' " This was evidenced by Kosowsky's November 2012 written presentation to LittelFuse concerning the proposed line of credit transaction in which he encouraged it to make the investment, stating that if Shocking failed, "LittelFuse would acquire Shocking['s] 'technology and patents for low price.' " (Mahamedi identified this in the Complaint as being "the 'LittelFuse Quid Pro Quo.' ")

[4] As described in the Complaint, " 'Plan A' " involved Kosowsky's attempt to remove the dissident director, Simon Michael, from Shocking's board of directors by suing him in Delaware for alleged breach of fiduciary duty. Kosowsky's " 'Plan A' " was ultimately unsuccessful. The Delaware court concluded that Michael had caused no damages to Shocking, and it declined to order the removal of Michael from Shocking's board of directors.

Notwithstanding that dissident director "Michael offered to beat LittelFuse's terms . . . , Kosowsky declined that offer" and proceeded with LittelFuse's secured line of credit transaction.

e. Services Provided by Mahamedi in January-February 2013

On December 31, 2012, Domokos, with Kosowsky's approval, instructed Mahamedi to undertake further European patent filings, four days before the deadline associated with the filings. On January 11, 2013, Domokos advised Mahamedi that Shocking "was in financial distress and that it was running out of money and financing options." But one week later, Domokos asked Mahamedi to continue with his patent filings and to ensure that deadlines were not missed; he assured Mahamedi that there were enough funds to pay him. And in February 2013, Domokos, with the approval of his codefendants, instructed Mahamedi to make last-minute international patent filings; he again assured Mahamedi that Shocking would find a way to pay Mahamedi. The filings involved costs advanced by Mahamedi of $22,000.

B. Demurrers to Second Amended Complaint

LittelFuse and Heinzmann filed a general demurrer to the Complaint pursuant to Code of Civil Procedure section 430.10, subdivision (e).[5] Heinzmann challenged the first through fifth causes of action, asserting that each claim failed to state facts sufficient to constitute a cause of action. LittelFuse challenged the fifth cause of action only, contending that it failed to state facts sufficient to constitute a cause of action. In separate pleadings, Kosowsky and Domokos filed a general demurrer to the first through fourth, sixth, and seventh causes of action of the Complaint. Mahamedi opposed both demurrers.

[5] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

After hearing argument on both demurrers and submitting the matter,[6] the court filed its order on December 15, 2015. The court sustained without leave to amend the demurrer of LittelFuse and Heinzmann to the first through fifth causes of action of the Complaint. The court further sustained without leave to amend respondents' position that the Complaint had not stated facts sufficient to constitute a cause of action for either civil conspiracy or aider and abettor liability.[7] On January 21, 2016, the court filed an order of dismissal after the sustaining of the demurrer of LittelFuse and Heinzmann. Mahamedi filed a timely appeal from the order of dismissal.

II. DISCUSSION

A. Applicable Law and Standards of Review

A party against whom a complaint or cross-complaint has been filed may file a demurrer to the pleading on particular grounds specified by statute, including the ground that the challenged pleading fails to allege facts sufficient to constitute a cause of action. (§ 430.30, subd. (e).) A demurrer does not "test the truth of the plaintiff's allegations or the accuracy with which he [or she] describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. [Citation.]" (*Committee on Children's Television, supra,* 35 Cal.3d at p. 213.) As such, "the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]" (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

We perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading states facts sufficient to constitute a cause of action.

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[6] Mahamedi elected to proceed without a reporter's transcript of the hearing on demurrer.

[7] Although not relevant to this appeal, with respect to the separate demurrer to the Complaint filed by Kosowsky and Domokos, the court (a) sustained without leave to amend the demurrer to the first and second causes of action; (b) sustained with leave to amend the demurrer to the third cause of action; and (c) overruled the demurrer to the fourth, sixth, and seventh causes of action.

(*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1075.)

On appeal, we will affirm a "trial court's decision to sustain the demurrer [if it] was correct on any theory. [Citation.]" (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, fn. omitted.) Thus, "we do not review the validity of the trial court's reasoning but only the propriety of the ruling itself. [Citations.]" (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757.)

An appellate court reviews the denial of leave to amend after the sustaining of a demurrer under an abuse of discretion standard. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) When a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 39.) The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320.)

B. No Error in Sustaining Without Leave Demurrer to Complaint

1. Breach of Fiduciary Duty (First Cause of Action vs. Heinzmann)

a. Fiduciary Duty and *Berg & Berg*

There are three essential elements that must be pleaded for a breach of fiduciary duty claim, namely, an existing fiduciary relationship, its breach, and damages proximately caused by the breach. (*Brown v. California Pension Administrators & Consultants, Inc.* (1996) 45 Cal.App.4th 333, 347-348.) Even though breach is a question of fact, "the existence of legal duty in the first instance and its scope are questions of law." (*Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790.)

A fiduciary duty may arise because it is either imposed by law or is undertaken by agreement. (*Maglica* v. *Maglica* (1998) 66 Cal.App.4th 442, 447 (*Maglica*).) "Fiduciary duties are imposed by law in certain technical, legal relationships such as those between partners or joint venturers [citation], husbands and wives [citation], guardians and wards, trustees and beneficiaries, principals and agents, and attorneys and clients [citation]" (*GAB Business Services v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 416, overruled on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154.)

There are no allegations in the complaint concerning a fiduciary relationship between Heinzmann and Mahamedi pursuant to contract; rather, Mahamedi's contention is that a fiduciary relationship was imposed by law. (See *Maglica*, *supra*, 66 Cal.App.4th at p. 447.) The alleged basis for the claim of breach of fiduciary duty is Heinzmann's role as a director of Shocking. Mahamedi alleges that Heinzmann, as a Shocking corporate director, "owed a fiduciary duty to creditors of Shocking, including Mahamedi, during Shocking's insolvency from April 2012 . . . to the company's demise in March 2013." The leading California case addressing this issue of fiduciary duties owed by directors of an insolvent corporation to its creditors—authority relied upon by both Mahamedi and by respondents herein—is *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020 (*Berg & Berg*).

In *Berg & Berg*, the plaintiff (Berg), the largest creditor of the failed entity, Pluris, Inc. (Pluris), brought suit against nine directors of Pluris, asserting a single claim for breach of fiduciary duty. (*Berg & Berg*, *supra*, 178 Cal.App.4th at pp. 1024-1025.) Berg alleged that the director-defendants' fiduciary duty to Berg and other Pluris creditors arose "when Pluris either became insolvent or entered into the 'zone of insolvency' at some point before the assignment" for the benefit of creditors (see §§ 493.010, 1802) was effectuated on behalf of Pluris. (*Berg & Berg*, *supra,* at p. 1025.) Berg alleged further that in completing the assignment for the benefit of creditors, the directors disregarded an alternative, a bankruptcy reorganization, which would have been of substantial benefit to Berg and other Pluris creditors because that proposed alternative would have resulted in the utilization of $50 million of Pluris's net operating losses. (*Ibid.*) The trial court sustained without leave to amend the defendants' demurrer to the third amended complaint for breach of fiduciary duty. (*Id.* at pp. 1024-1025, 1032.)

After extensive discussion of federal and out-of-state authority on the issue (*Berg & Berg*, *supra*, 178 Cal.App.4th at pp. 1038-1041), a panel of this court held that in California, "there is no broad, paramount fiduciary duty of care or loyalty that directors of an insolvent corporation owe [its] creditors solely because of a state of insolvency . . . [A]nd we decline to create any such duty, which would conflict with and dilute the statutory [(see Corp. Code, § 309, subd. (a))] and common law duties that directors already owe to shareholders of the corporation." (*Id.* at p. 1041.) The *Berg & Berg* court concluded: "[T]he scope of any extracontractual duty owed by corporate directors to the insolvent corporation's creditors is limited in California, consistently with the trust-fund doctrine, *to the avoidance of actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors*[*'*] *claims.* This would include acts that involve self-dealing or the preferential treatment of creditors." (*Ibid.*, fn. omitted, original italics.)[8] And the court held that "there

[8] As explained in *Berg & Berg*, "the ' "trust fund doctrine" ' [involves circumstances] where ' "all of the assets of a corporation, immediately upon becoming insolvent, become a

is no fiduciary duty prescribed under California law that is owed to creditors by directors of a corporation solely by virtue of its operating in the 'zone' or 'vicinity' of insolvency." (*Ibid.*, fn. omitted.)

Applying these principles, the court observed that the facts presented did "not involve self-dealing or prohibited preferential treatment of creditors and further [did] not constitute the actual diversion, dissipation, or undue risking of Pluris's assets . . . . [T]hese facts allege that another course of action, if explored and pursued, might have offered more value in the end or that beneficial, maximum, or more valuable use could thereby have been made of Pluris's net operating losses . . . and to the extent the claim asserts that the breach was the failure to have contacted Berg in order to more fully explore the details of its reorganization plan before making the assignment, that failure alone cannot, as a matter of law, have constituted the diversion, dissipation, or undue risking of assets that could have otherwise been used to pay creditors' claims." (*Berg & Berg, supra,* 178 Cal.App.4th at p. 1043.)

b. Breach of Fiduciary Duty Under *Berg & Berg* Not Alleged

The allegations of the Complaint are that as a director, Heinzmann (as well as Kosowsky as a director and Domokos as an officer) owed fiduciary duties to creditors of Shocking during the period of its insolvency from April 2012 to March 2013. These fiduciary duties "prohibited Heinzmann, Kosowsky and Domokos from dissipating the assets of Shocking, or engaging in any self-dealing." Mahamedi alleged further that "Kosowsky and Domokos led the effort to convey the Shocking patent portfolio to LittelFuse at far below its value, as part of the LittelFuse Quid Pro Quo and as part of Plan B." Insofar as the breach of fiduciary duty claim concerned the line of credit transaction, Mahamedi alleges that "[s]ince LittelFuse was represented on the Board of

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trust fund for the benefit of all creditors" ' in order to satisfy their claims. [Citations.]" (*Berg & Berg, supra,* 178 Cal.App.4th at p. 1040, fn. omitted.)

Directors through Heinzmann, LittelFuse obtained an unlawful benefit by pillaging Shocking for assets that could have been used to pay creditors, including Mahamedi."

Mahamedi argues on appeal that the Complaint contains facts sufficient to support a claim of breach of fiduciary duty under *Berg & Berg*, *supra*, 178 Cal.App.4th 1020.[9] He contends "that Heinzmann violated the *Berg* rule when he (and by extension, LittelFuse) agreed to Kosowsky's plan to 'tank' Shocking, and ensure that LittelFuse would obtain the Shocking patents for 'cheap.' " The portion of the Complaint cited by Mahamedi—on four occasions in the section of his opening brief concerning the fiduciary duty claim—cannot be so construed as containing the allegation that Heinzmann specifically "agreed to Kosowsky's plan to 'tank' Shocking." Rather, the allegations are that Kosowksy and Domokos devised the agreement to " 'tank' Shocking," and Kosowsky sent a presentation to LittelFuse and Heinzmann in November 2012 seeking to persuade LittelFuse to provide further funding by stating that were Shocking to fail, "LittelFuse would acquire Shocking 'technology and patents for low-price.' "

The allegations of the Complaint do not support Mahamedi's claim that Heinzmann breached a fiduciary duty in the sense that his action was one to "divert, dissipate, or unduly risk corporate assets" of Shocking that might otherwise be used to pay creditors' claims. (*Berg & Berg*, *supra*, 178 Cal.App.4th at p. 1041, italics omitted.) Nor is the vague allegation in the same paragraph of the Complaint cited by Mahamedi—that "by November

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[9] Although respondents argue conclusorily that Mahamedi "failed to establish that Heinzmann *owed or* breached any fiduciary duty to [Mahamedi]" (italics added), they do not otherwise challenge the allegation that Shocking was insolvent as of April 2012, thereby giving rise under *Berg & Berg* to a limited fiduciary duty owed by Heinzmann, as a director, to Shocking's creditors. Any claim by respondents that Mahamedi failed to allege the existence of a fiduciary duty is forfeited. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*) ["conclusory presentation, without pertinent argument or an attempt to apply the law to the circumstances . . . is inadequate," and issue is therefore deemed abandoned].) We therefore assume for purposes of our review that Mahamedi adequately pleaded that Shocking was insolvent and therefore its directors, including Heinzmann, owed fiduciary duties to Shocking's creditors.

2012, everyone knew that Shocking would fail because there were no other investors interested in Shocking"—sufficient to create a fiduciary duty breach by Heinzmann. Likewise, the allegation that "LittelFuse obtained an unlawful benefit by pillaging Shocking for assets that could have been used to pay creditors" is insufficient to state a breach of fiduciary duty claim against Heinzmann under *Berg & Berg*. The allegation is that *LittelFuse*, not Heinzmann, obtained the unlawful benefit of "pillaging" Shocking's assets. Moreover, it must be noted that the first cause of action is directed at the three individual defendants; it is *not* directed against LittelFuse.

As we understand it, the essence of Mahamedi's position concerning breach of fiduciary duty is that Heinzmann, as a director of Shocking, supported the financing arrangement under which LittelFuse ultimately agreed to provide a $2 million line of credit to Shocking in exchange for receiving a security interest in its patent portfolio. But rather than establishing, for purposes of demurrer, a breach of fiduciary duty under *Berg & Berg*, this transaction does not on its face show actions by Heinzmann constituting a diversion or dissipation of, or undue risk placed upon, Shocking's assets that might otherwise be used to satisfy creditors' claims. (See *Berg & Berg*, *supra*, 178 Cal.App.4th at p. 1041.) The circumstances alleged here do not follow the general pattern of cases described and relied upon in *Berg & Berg*, *supra*, at page 1040, where, under the trust-fund doctrine as applied in California, a breach of fiduciary duty was found for (1) directors' having diverted assets of the insolvent corporation to pay preferred creditors (*Saracco Tank & Welding Co. v. Platz* (1944) 65 Cal.App.2d 306, 313–318); (2) a controlling partner's having paid as a preference an insolvent partnership's obligation to the partner's own corporation (*Commons v. Schine* (1973) 35 Cal.App.3d 141, 145); (3) a controlling company's having made a preferential payment of the debts of an insolvent company it controlled (*Title Ins. & Trust Co. v. California Development Co.* (1915) 171 Cal. 173, 206-207); (4) directors'/creditors' of an insolvent corporation having secured a preference to their claims over claims of other corporate creditors (*Bonney v. Tilley* (1895) 109 Cal. 346, 351-352); (5) a director's having

made a fraudulent transfer of corporate assets to himself (*In re Wright Motor Co.* (9th Cir. 1924) 299 F. 106, 109-110); or (6) a director's having used the assets of an insolvent corporation to guarantee his personal debt (*In re Jacks* (9th Cir. BAP 2001) 266 B.R. 728, 736).

In short, the fact that, according to the allegations of the Complaint, LittelFuse ultimately obtained Shocking's patent portfolio pledged as security for the line of credit advanced to Shocking did not constitute a diversion or dissipation of Shocking's assets. And the line of credit transaction itself—at least based upon the allegations of the Complaint—did not constitute the placement of an undue risk upon Shocking's assets. According to what Mahamedi alleged, Shocking, by April 2012, was in dire financial straits. Its acceptance of $2 million in additional capital from LittelFuse in November 2012 to address the company's financial difficulties was not the type of undue risk contemplated by *Berg & Berg* for the imposition of director liability.

c. Claim Barred by Business Judgment Rule

Even assuming Mahamedi had adequately pleaded breach of fiduciary duty, the Complaint nonetheless fails because the cause of action is barred by the business judgment rule, a rule that "has been codified in California at Corporations Code section 309." (*Berg & Berg*, *supra*, 178 Cal.App.4th at p. 1045.) Although this was not the basis for the trial court's decision to sustain the demurrer, because it is the validity of the ruling on demurrer and not the trial court's reasoning that is the concern of the appellate court, if the order sustaining demurrer was correct on this unstated theory, we must affirm. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787 (*Bader*).)[10]

As explained by the Second District Court of Appeal, Division Three: "The business judgment rule is ' "a judicial policy of deference to the business judgment of corporate

[10] Respondents raised below their contention that the business judgment rule barred Mahamedi's breach of fiduciary duty claim. They briefly reiterate the argument in this court.

directors in the exercise of their broad discretion in making corporate decisions." ' [Citations.] The rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. [Citations.] The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. [Citations.]" (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 711 (*Lee*).) There are two components to the business judgment rule, namely, "one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest." (*Id.* at p. 714.)

"An exception to the presumption afforded by the business judgment rule . . . exists in 'circumstances which inherently raise an inference of conflict of interest' and the rule 'does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest.' [Citations.] But a plaintiff must allege sufficient facts to establish these exceptions. To do so, more is needed than 'conclusory allegations of improper motives and conflict of interest. Neither is it sufficient to generally allege the failure to conduct an active investigation, in the absence of (1) allegations of facts which would reasonably call for such an investigation, or (2) allegations of facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment.' [Citation.] In most cases, 'the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. [Citation.] Interference with the discretion of directors is not warranted in doubtful cases.' [Citation.]" (*Berg & Berg*, *supra*, 178 Cal.App.4th at

pp. 1045-1046.) The defendant may challenge by demurrer a plaintiff's failure to plead sufficient facts rebutting the business judgment rule, because the sufficiency of the pleading of those facts is a question of law. (*Id.* at p. 1046.)

Here, the allegations of the Complaint are that as a director, Heinzmann (and Kosowsky as a director and Domokos as an officer) owed fiduciary duties to creditors of Shocking during the period of its insolvency from April 2012 to March 2013. These fiduciary duties "prohibited Heinzmann . . . from dissipating the assets of Shocking, or engaging in any self-dealing." And Mahamedi alleges that "Kosowsky and Domokos led the effort to convey the Shocking patent portfolio to LittelFuse at far below its value, as part of the LittelFuse Quid Pro Quo and as part of Plan B." To the extent that Mahamedi's breach of fiduciary duty claim is based upon Heinzmann's role as a Shocking director in approving the secured line of credit transaction involving LittelFuse, the matter is plainly covered by the business judgment rule. (See *Lee*, *supra*, 50 Cal.App.4th at p. 711.) The corporate action was covered by the "presumption that directors' decisions are based on sound business judgment." (*Berg & Berg*, *supra*, 178 Cal.App.4th at p. 1045.) As such, Mahamedi was required to plead sufficient facts to rebut this presumption—something "more . . . than 'conclusory allegations of improper motives and conflict of interest.' " (*Ibid.*)

Mahamedi alleges—in paragraphs of the Complaint that are incorporated by reference into the breach of fiduciary duty cause of action—that Heinzmann (1) was an officer of LittelFuse; (2) was an outside director of Shocking between July 2012 and March 2013; (3) participated in an August 2012 Shocking board meeting in which a financial report about its patents that had been prepared by Mahamedi was presented, and Heinzmann was appointed at that time to the board's finance committee; (4) instructed (along with Kosowsky) Mahamedi to aggressively prosecute the Shocking patent portfolio; (5) participated in an October 2012 board meeting in which Domokos was instructed to aggressively pursue Shocking's patent rights despite knowing that the company was going

to run out of money and would be unable to pay Mahamedi; (6) exercised control over Shocking expenditures in November 2012 and thus was aware of Kosowsky's offer to Mahamedi to pay him $100,000 for outstanding billings to induce him to continue performing patent work; (7) was able (on behalf of LittelFuse) to exert significant influence over Shocking, including engineering the line of credit transaction; (8) instructed (along with LittelFuse) that LittelFuse's attorney make due diligence requests, knowing that Mahamedi would perform the work necessary to respond to them and that Shocking did not have sufficient money to pay him for the work; and (9) knew that Kosowsky and Domokos had acted wrongfully by agreeing to the line of credit transaction under which Shocking would provide security that would allow LittelFuse to acquire Shocking's intellectual property cheaply. And, as noted, Mahamedi alleges in the first cause of action that "LittelFuse obtained an unlawful benefit by pillaging Shocking for assets that could have been used to pay creditors."

These allegations are insufficient to rebut the presumption that Heinzmann's actions were protected under the business judgment rule, as they do not constitute " 'affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. [Citation.]" (*Berg & Berg*, *supra*, 178 Cal.App.4th at p. 1046.) Moreover, to the extent that Mahamedi contends that the allegation in the Complaint—incorporated by reference into the first cause of action—that the dissident shareholder, Michael, "offered to beat" the proposal by LittelFuse to provide a secured line of credit to Shocking but Kosowsky declined the offer, provides support for the breach of fiduciary duty claim or constitutes specific facts rebutting the business judgment rule, we disagree. This generalized allegation *against Kosowsky* neither established a diversion or dissipation of corporate assets (*id.* at pp.1041) nor specific facts showing fraud, bad faith, overreaching, or an unreasonable failure to investigate (*id.* at p. 1046) to support a breach of fiduciary duty claim against Heinzmann. Accordingly, Mahamedi's first cause of action failed to state a claim for breach of fiduciary duty for the additional reason—not

stated by the trial court—that Heinzmann's alleged actions were insulated from liability under the business judgment rule. (*Bader, supra,* 179 Cal.App.4th at p. 787.)

d. Nondisclosure Allegations in First Cause of Action

Mahamedi alleges further in the first cause of action that "Heinzmann and Kosowsky also breached their fiduciary duty by failing to timely disclose the Failure Conditions [the technical flaw with Shocking's product, Kosowsky's misrepresentations about Shocking's revenues and its customers, Shocking's expensive litigation in Delaware, the absence of other Shocking investors and the certainty that Shocking would run out of money in 2012, Shocking's insolvency, and Shocking would not pay the law firm in the immediate future] to Mahamedi." He asserts conclusorily in one sentence of his opening brief that the trial court erred in concluding "that Heinzmann had no fiduciary duty to disclose the Failure Conditions." Mahamedi is deemed to have abandoned this claim of error due to his perfunctory and inadequate argument of the point. (*Benach, supra,* 149 Cal.App.4th at p. 852.) Even were we to consider its merits, the argument fails.

As a panel of this court has explained: "*[T]here is no broad, paramount fiduciary duty of care or loyalty that directors of an insolvent corporation owe [its] creditors solely because of a state of insolvency* . . . . [T]he scope of any extracontractual duty owed by corporate directors to the insolvent corporation's creditors *is limited in California*, consistent[ly] with the trust fund doctrine, to the avoidance of actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors[']claims." (*Berg & Berg, supra,* 178 Cal.App.4th at p. 1041, italics added, original italics omitted.) We have discussed this limited fiduciary duty above and have concluded that Mahamedi failed to state facts sufficient to constitute a cause of action for breach of fiduciary duty under *Berg & Berg*. There is no expanded fiduciary duty on the part of Heinzmann as a director to disclose facts to Shocking's creditors, such as Mahamedi, and he cites no authority to support such a conclusion. We therefore conclude that no breach of fiduciary

duty claim founded upon Heinzmann's "failing to timely disclose the Failure Conditions" was alleged in the Complaint.

2. Negligence (Third Cause of Action vs. Heinzmann)

A complaint for negligence requires allegations of the elements of (1) the defendant's owing a duty of care, (2) a breach of that duty, and (3) that breach of duty being the proximate cause of the plaintiff's resulting injury. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 292.) The absence of a legal duty defeats any claim of negligence. (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 396.) And the existence of a duty of care to support a negligence cause of action is a question of law to be decided by the court. (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 770-771; see also *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526-527 [demurrer to negligence claim properly sustained where plaintiff fails to plead that defendant owed duty of care].)

The allegations of the third cause of action of the Complaint for negligence are nearly identical to those in the first cause of action for breach of fiduciary duty. Mahamedi alleges in the negligence claim that Heinzmann (as well as Kosowsky and Domokos) "owed a duty of care to Shocking's creditors, including Mahamedi, during Shocking's insolvency from April 20121 through . . . the company's demise in March 2013." He alleges further that "[t]his duty of care prohibited from [*sic*] dissipating the assets of Shocking, or engaging in any self-dealing." The next two paragraphs of the third cause of action—that "Kosowsky led the effort to convey the Shocking patent portfolio to LittelFuse at far below its value," and that LittelFuse "obtained an unlawful benefit by pillaging Shocking"—are identical to those found in the first cause of action. And Mahamedi alleges—as he does in the first cause of action—that "Heinzmann . . . also breached [his] fiduciary duty by failing to timely disclose the Failure Conditions to Mahamedi."

The trial court concluded that Mahamedi had failed to state a cause of action for negligence because the allegations of the third cause of action "all relate to breach of fiduciary duty." We agree with the court that Mahamedi failed to plead facts showing the

existence a separate duty of care owed to him by Heinzmann other than a fiduciary duty as a director of an insolvent corporation. And as we have concluded, *ante*, Mahamedi failed to allege sufficient facts to support a claim against Heinzmann for breach of the limited fiduciary duty owed to creditors of an insolvent corporation as described in *Berg & Berg*, *supra*, 178 Cal.App.4th at page 1041. Respondents' demurrer to the third cause of action was properly sustained by the court.[11]

3. Fraudulent Concealment (Fifth Cause of Action vs. Heinzmann and Littlefuse)

A claim for fraudulent concealment has five elements. The plaintiff must plead that "(1) the defendant . . . concealed or suppressed a material fact, (2) the defendant [was] under a duty to disclose the fact to the plaintiff, (3) the defendant . . . intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff [was] unaware of the fact and would not have acted as he [or she] did if he [or she] had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613 (*Marketing West*).) As has been explained

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[11] Although not stated as a basis for the trial court's ruling, respondents also asserted below that the negligence claim was demurrable because, on its face, it was barred by a two-year statute of limitations. Respondents briefly reassert this statute of limitations defense on appeal. The allegations concern the secured line of credit transaction of November 2012 and Heinzmann's failure to reveal to Mahamedi the "Failure Conditions" when he instructed counsel for LittelFuse to make due diligence requests in November 2012. Since the action was not commenced within two years of that time (i.e., the initial complaint was filed March 23, 2015), the negligence claim on its face was time-barred. (See *Burt v. Irvine Co.* (1965) 237 Cal.App.2d 828, 865 [action based on negligence of corporate director subject to two-year statute of limitations].) Based upon this facial deficiency, Mahamedi was required to "plead facts which show an excuse, tolling, or some other basis for avoiding the statutory bar" (*Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1768), which he failed to do. The order sustaining demurrer was therefore proper for this additional reason, even though it was one not stated by the trial court. (*Bader*, *supra*, 179 Cal.App.4th at p. 787.)

with respect to the second element, "[t]he general rule for liability for nondisclosure is that even if material facts are known to one party and not the other, failure to disclose those facts is not actionable fraud unless there is some fiduciary or confidential relationship giving rise to a duty to disclose. [Citation.]" (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 (*La Jolla Village*), disapproved of on other grounds by *Jimenez v. Superior Court* (2002) 29 Cal.4th 473.)

In instances where there is no fiduciary or other confidential relationship giving rise to a duty to disclose, there are at least three recognized transactions under which a claim for nondisclosure is recognized. They are " '(1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff. (Fns. omitted.)' [Citation.]" (*Marketing West, supra,* 6 Cal.App.4th at p. 613, quoting *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 (*Warner*).)[12]

Mahamedi alleges that Heinzmann "had a fiduciary duty or extra-contractual duty to disclose the Failure Conditions to Mahamedi at least as of the Due Diligence Requests [in November 2012]." Further, he alleges, "even if Domokos and Kosowsky [*sic*[13]] did not owe a fiduciary duty or extra-contractual duty to Mahamedi, Heinzmann was under an obligation to disclose the Failure Conditions because: (a) [they] were known or accessible only to the

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[12] *Warner, supra,* 2 Cal.3d 285 involved an instance in which a contractor's tort action against the city was disallowed because of governmental immunity, and the case was tried only on a contract theory. At least one court has held that the three *Warner* exceptions to the principle of nonliability for fraudulent nondisclosure in transactions where there was an absence of a fiduciary or other confidential relationship is limited to "instances where a contract cause of action for nondisclosure will apply without a confidential or fiduciary relationship." (*La Jolla Village, supra,* 212 Cal.App.3d at p. 1150.)

[13] We assume from the context of the pleading that this was a typographical error, and that the reference to Kosowsky was in fact intended to be to Heinzmann.

defendants, and the defendants knew that they were not known or reasonably discoverable by Mahamedi, and (b) the defendants actively concealed the discovery of the Failure Conditions from Mahamedi." Mahamedi alleges that "Heinzmann concealed the Failure Conditions from Mahamedi for the purpose of defrauding [him]." He alleges further that he was unaware of the Failure Conditions, and he would not have conducted himself as he did had he been aware of them; instead, he would have withdrawn from his engagement as Shocking's counsel. He alleges that he reasonably relied on the misrepresentations alleged in the Complaint and was damaged.

We have held, *ante*, that there was no fiduciary duty owed by Heinzmann, as a Shocking director, to Mahamedi to disclose information. Such claimed duty is beyond "the scope of any extracontractual duty owed by corporate directors to the insolvent corporation's creditors [which] *is limited in California* . . . to the avoidance of actions that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors[']s claims." (*Berg & Berg*, *supra*, 178 Cal.App.4th at p. 1041, italics added, original italics omitted.) And Mahamedi alleges no facts upon which a confidential relationship between Heinzmann and him could be inferred. Moreover, Mahamedi alleges no facts supporting a claim of a fiduciary or other confidential relationship between him and LittelFuse arising from its role as a Shocking investor. He therefore failed to allege the essential element of duty required of a typical claim for nondisclosure. (*Marketing West, supra,* 6 Cal.App.4th at pp. 612-613; see *La Jolla Village, supra,* 212 Cal.App.3d at p. 1151.)

Nor did Mahamedi adequately plead a nondisclosure claim against either Heinzmann or Littelfuse based upon one of the three exceptions to the necessity of a fiduciary duty or other confidential relationship as described in *Warner, supra*, 2 Cal.3d at page 294. First, because neither Heinzmann nor LittelFuse (as opposed to Shocking) engaged in a "transaction[]" with Mahamedi, we are doubtful that any of the *Warner* exceptions could be applied here, since the Supreme Court stated that they applied "[i]n *transactions* which do

not involve fiduciary or confidential relations." (*Ibid.*, italics added; cf. *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 650 [seller's attorney, who was not part of transaction, made no representations, and did not seek to persuade buyer to proceed, not liable for concealment regarding conditions of property].) In any event, Mahamedi's pleading is inadequate. It is apparent that his contention is that he adequately pleaded the second *Warner* exception, namely, that "the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff." (*Warner, supra*, at p. 294.) He has failed to specifically plead fraud in support of this *Warner* exception. Mahamedi has pleaded conclusorily that LittelFuse and Heinzmann (1) "knew about the Failure Conditions at least as of the August 8, 2012 board meeting"; (2) failed to disclose them to Mahamedi; (3) "knew that they had failed to make the necessary disclosures"; (4) knew that the Failure Conditions "were not known or reasonably discoverable by Mahamedi"; and (5) "actively concealed the discovery of the Failure Conditions from Mahamedi." The absence of specificity of these allegations, including when and by what means respondents "actively concealed" the Failure Conditions from Mahamedi, renders the Complaint deficient. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645 (*Lazar*) [specific pleading requirement for fraud]; see also *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 868-877 [failure to plead elements of concealment, including duty, fraudulent intent, and causation, in claim by commercial lessee against lessor's broker rendered claim demurrable].) Further, "the mere conclus[ory] allegations that the omissions were intentional and for the purpose of defrauding and deceiving plaintiff[] and bringing about . . . [his actions, including forgoing withdrawing from his engagement with Shocking] and that plaintiff[] relied on the omissions . . . are insufficient." (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347.)

Mahamedi cites *Westrick v. State Farm Insurance* (1982) 137 Cal.App.3d 685 (*Westrick*) in support of his position that he adequately pleaded a nondisclosure claim against respondents. *Westrick* is inapposite. There, insureds brought suit against their

insurance agent and insurer in a lawsuit that included claims for negligence and negligent misrepresentation. (*Id.* at pp. 687-688.) The plaintiffs contended, inter alia, that their insurance agent gave improper advice regarding insurance coverage and failed to warn them against taking certain actions until insurance had been procured. (*Id.* at pp. 688-689.) The appellate court held that the trial court had improperly granted a directed verdict in favor of the defendants, citing the insurer's duty of good faith and fair dealing owed to its insured; the recognized disparity of knowledge as between insurers and their insureds; and the insurer's obligation to inform its insured of his or her rights and obligations under the insurance policy. (*Id.* at pp. 691-693.) *Westrick* is obviously distinguishable. In this instance, there is no business relationship between respondents (corporate director and an investor) and Mahamedi (outside counsel for the corporation) that is in any way parallel to the relationship of the parties in *Westrick* of insured and insurer/insurer's agent.

The trial court properly sustained the demurrer to the fifth cause of action of the Complaint.

4. Conspiracy Allegations (vs. Heinzmann and Littelfuse)

The Complaint includes allegations prior to the specific causes of action concerning a civil conspiracy existing among all defendants. The trial court held that these allegations were insufficient to support civil conspiracy involving respondents. It held that Mahamedi had "not sufficiently allege[d] an agreement between LittelFuse, Heinzmann, and Kosowsky to perpetrate a fraud on [Mahamedi]."

Civil conspiracy is not a separate cause of action; rather it is "a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) Civil

conspiracy by itself is not actionable; "[i]t must be activated by the commission of an actual tort. (*Id.* at p. 511.)

" 'The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. . . . In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he [or she] was a direct actor and regardless of the degree of his [or her] activity. [Citations.]' [Citations.]" (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44.) The elements must be pleaded with some specificity. In alleging the formation and operation of the conspiracy and the nature of the wrongful acts and the resulting damage, " 'bare legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient. [Citation.]' [Citation.]" (*State of California ex rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 419.) And where, as is the case here, fraud is alleged to be the object of the conspiracy, the claim must be pleaded with particularity, namely, the plaintiff must plead " ' " '*facts* which show how, when, where, to whom, and by what means the representations were tendered' " ' " (*Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 211 (*Favila*), quoting *Lazar, supra*, 12 Cal.4th at p. 645, original italics.)

Mahamedi alleges that all defendants were aware of the Failure Conditions. He alleges further that LittelFuse and Kosowsky agreed that LittelFuse would provide a line of credit to Shocking so that LittelFuse could acquire Shocking's intellectual property "for 'cheap' "; that Mahamedi should continue to prosecute Shocking's patent portfolio vigorously, incurring fees and costs in doing so; and "Shocking could not and would not pay Mahamedi for those fees and costs." LittelFuse, through Heinzmann, was able to exert significant influence over Shocking, including engineering the line of credit transaction. Mahamedi alleges that the conspiracy between the defendants succeeded because Mahamedi

completed the tasks necessary to save Shocking's patents, albeit without Mahamedi getting paid.

The conspiracy allegations lack the requisite specificity. With respect to pleading the first element of formation and operation of the conspiracy, the "plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823.) Mahamedi's allegations that LittelFuse agreed with Kosowsky in November 2012 to provide a letter of credit to Shocking as a means of cheaply acquiring Shocking's patent portfolio, and to encourage Mahamedi to continue to perform patent work with Shocking being unable and not inclined to pay for those services are too general to set forth LittelFuse's "knowledge of and agree[ment] to both the objective and the course of action." (*Ibid.*) And the allegations concerning Heinzmann—that he knew of the Failure Conditions and exerted influence as a board member to have Shocking agree to the line of credit transaction and reject any proposal from Michael—are clearly insufficient to show his knowledge or and agreement to the objective and course of action of any conspiracy. Further, as we have noted, *ante*, to the extent Mahamedi contends elsewhere in his opening brief "that Heinzmann . . . (and by extension, LittelFuse) agreed to Kosowsky's plan to 'tank' Shocking, and ensure that LittelFuse would obtain the Shocking patents for 'cheap,' " the allegations of the Complaint do not support this specific argument. And since the object of the conspiracy was some fraud that was perpetrated upon Mahamedi, he was required to plead—and failed to do so—the fraud with specificity, including the specific representations that were made and when and by whom they were made, and how they resulted in injury to Mahamedi. (*Favila, supra,* 188 Cal.App.4th 211.)[14]

[14] If, as is emphasized in the conspiracy allegations of the Complaint, the "fraud" was the ultimate consummation of the secured line of credit transaction under which LittelFuse provided $2 million in additional capital to Shocking in November 2012, Mahamedi was, in one sense, benefited by the "fraud," in that he alleges that he received one or more

The trial court did not err in concluding that the Complaint did not allege sufficient facts to support civil conspiracy allegations against respondents.

5. Aiding and Abetting Allegations (vs. Heinzmann and Littelfuse)

In a section prior to the specific causes of action in the Complaint and immediately after the conspiracy allegations, Mahamedi alleges as a theory alternative to civil conspiracy that each of the defendants was liable because he or it "aided and abetted [the other defendants] to perform the fraud described above." The trial court concluded that the allegations of vicarious liability under and aiding and abetting theory were insufficient.

"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. [Citations.]" (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846 (*Saunders*).) Knowledge that a tort is being committed and failing to take action to prevent it are insufficient to establish aiding and abetting. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326.) Rather, " '[a]iding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.' [Citation.] [¶] . . . [A]iding and abetting . . . necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 748-749 (*Howard*).)

In the aiding and abetting section of his Complaint, Mahamedi alleges that, assuming that LittelFuse did not agree with Kosowsky and Domokos to defraud Mahamedi, LittelFuse and Heinzmann were aware of the Failure Conditions by August 2012. Mahamedi alleges

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additional payments from Shocking on or after November 2012, the source of which was presumably the line of credit.

that they failed to disclose the Failure Conditions to him. He alleges further that LittelFuse and Heinzmann gave substantial assistance to their codefendants "concerning Plan B by (a) instructing LittelFuse's lawyers to make Due Diligence Requests, knowing that Mr. Mahamedi would perform the diligence services requested at a time when Heinzmann and LittelFuse knew that there were not sufficient funds to pay Mr. Mahamedi; and (b) instructing Domokos and Kosowsky, at least as of August 8, 2012, to take all steps necessary to fully prosecute Shocking's patent portfolio regardless of Shocking's ability to pay. This assistance was a substantial factor in causing [Mahamedi's] harm," because without the assistance, Mahamedi would not have continued to provide legal services to Shocking. And Mahamedi alleges that Heinzmann knew that Kosowsky and Domokos had acted wrongfully by "engaging in the Quid Pro Quo Agreement with Kosowsky," and failing to disclose the Failure Conditions to Mahamedi.

The Complaint does not allege sufficient facts to support aider and abettor liability against respondents. Initially, we observe that any aider and abettor theory of liability must fail under the second *Saunders* prong—where the person "(b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person" (*Saunders*, *supra*, 27 Cal.App.4th at p. 846)—because, as we have concluded, *ante*, the Complaint fails to allege facts supporting a breach of duty on the part of respondents to Mahamedi. Further, the allegation that respondents were aware of the Failure Conditions by August 2012 but failed to disclose them to Mahamedi is of no legal consequence or relevance to aider and abettor liability; we have concluded, *ante*, that respondents' alleged nondisclosure was not actionable.

The Complaint does not contain sufficient facts that respondents knew that their codefendants' conduct was wrongful, i.e., fraudulent. (See *Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1148, 1152 [complaint demurrable, inter alia, because it failed to establish defendant banks "had actual knowledge of the primary violation in which

they participated"].) Mahamedi also fails to allege that respondents "reach[ed] a conscious decision to participate in tortious activity for the purpose of assisting [their codefendants] in performing a wrongful act." (*Howard, supra,* 2 Cal.App.4th at p. 749.) Likewise, he fails to allege sufficient facts that respondents provided substantial assistance or encouragement to their codefendants toward the commission of the wrongful act or acts. While he alleges that respondents instructed (1) LittelFuse's attorneys to make due diligence requests resulting in Mahamedi's performing legal work, and (2) Kosowsky and Domokos to aggressively prosecute Shocking's patent portfolio, there is little clarity as to how these actions substantially assisted the fraudulent conduct of their codefendants. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 97 [complaint demurrable based upon insufficient facts showing defendant's substantial assistance or encouragement].)

We conclude the trial court properly found that the allegations of the Complaint were insufficient to support aider and abettor liability against respondents.[15]

6. Denial of Leave to Amend

Mahamedi's opposition to respondents' demurrer below contained no discussion concerning how he could cure any pleading defect if he were allowed leave to amend his Complaint.[16] And Mahamedi fails to argue here that the court erred in denying leave to amend when it sustained the demurrer to the Complaint. Accordingly, Mahamedi has

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[15] As noted, the court sustained without leave to amend Heinzmann's demurrer to the second cause of action (unfair competition), and fourth cause of action (concealment) of the Complaint. Mahamedi does not challenge those aspects of the trial court's order on demurrer in this appeal, and any such challenges are therefore abandoned. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 (*Tiernan*) [appellate court treats as abandoned arguments made at trial level that are not asserted on appeal].)

[16] The opposition stated as a proposition of law, without elaboration, that "[i]f there is a reasonable possibility that a pleading defect can be cured, leave to amend must be granted. [Citations.]" This bare recitation of a legal proposition, without more, did not present the trial court with information as to how Mahamedi proposed to cure any pleading defect.

abandoned any challenge to the trial court's denial of leave to amend. (*Tiernan, supra,* 33 Cal.3d at p. 216, fn. 4.)

III. DISPOSITION

The order of dismissal entered on January 21, 2016, on the order sustaining the demurrer of LittelFuse, Inc. and David Heinzmann to the first through fifth causes of action of the Second Amended Complaint is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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